IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1776

JOHN HENRY LONG,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:
LENIHAN, IVERS, JENSEN & McATEER, P.S.

JAMES F. McATEER,
Attorney for Petitioner

Office and Post Office Address:
1114 Norton Building
Seattle, Washington 98104
Telephone: (206) 624-4212

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

IN THE

Supreme Court of the United States

October Term, 1975

No. .....

JOHN HENRY LONG,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, John Henry Long, respectfully prays that a writ of certiorari be issued to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in "United States of America, Plaintiff-Appellee, v. John Henry Long, Defendant, Appellant, No. 74-2536" on April 5, 1976.

I.

CITATION TO OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B, p. A-4, and is reported in .... F.2d .... (1976).

II.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254 and Rule 22(2) of this Court. A Petition for Rehearing was timely filed on April 16, 1976. Rehearing was denied on May 17, 1976.

III.

QUESTION PRESENTED

1. Whether a defendant's Sixth Amendment right to have compulsory process for obtaining witnesses is prejudicially violated where a trial judge quashed a subpoena served on a defendant's witness who was a participant in the alleged sale of cocaine. The subpoena was served on the witness prior to trial by the U.S. Marshal. At the suggestion of the government trial attorney, the trial judge conducted an *in camera* hearing and thereafter quashed the defendant's subpoena.

2. Whether the government's voluntary disclosure of the name of an undercover narcotics agent constituted a waiver of the "identity of informer" privilege. The agent was known to defendant merely as "Ric." In response to defendant's discovery motion, the United States attorney disclosed the identity of the agent as "Ric Lyles." The Court had ordered the subpoena served at government expense.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

The Constitutional provision involved is the Sixth Amendment to the Constitution of the United States. The

statutes involved are the Federal Rules of Evidence, Public Law 93-595, January 2, 1975, and Rule 501, 88 Stat. 1933, and the Federal Rules of Evidence (Supreme Court Version) Rule 510 and Rule 511, all are printed in Appendix A hereto.

V.

STATEMENT OF CASE

The Petitioner was charged under a two count indictment alleging that Petitioner distributed cocaine, a narcotic substance, in violation of 21 USC §841. Pursuant to Rule 16 and Rule 46 of the Federal Rules of Criminal Procedure, the Petitioner moved the Court for discovery of the name, identity and whereabouts of the government informer that was present at the time, place, and happening alleged in the indictment and for a material witness complaint (CR 3)*. The government furnished defense counsel the name of the government agent and "indicated it would be willing to attempt to serve a subpoena of the defendant on the person so identified" (CR 6). Pursuant to Rule 17(b), Federal Rules of Criminal Procedure, the Court signed an order authorizing the U.S. Marshal to serve subpoenas on defense witnesses, including Ric Lyles (CR 10).

In 1968 or in 1969, when the Petitioner was only 17 years old, he met Ric Lyles at a restaurant on Jefferson Street, Seattle, Washington, where defendant would sometimes eat his dinner or morning breakfast after working swing-shift at the Boeing Company (RT 142-143). Four

*Record on Appeal in 2 volumes. Volume 1 is the Clerk's Record (Pleadings) and will be identified herein as (CR). Volume 2 is the Reporter's Transcript and will be identified herein as (RT).

years later, in about December of 1973, Petitioner again had contact with Ric Lyles. Lyles propositioned him regarding narcotics, but Petitioner rebuked him and told him it was a "bad scene." Subsequently, in January of 1974, Petitioner gave Lyles a ride home and Lyles again propositioned him with the story that he really had a "fool" on the line (RT 144). Petitioner again rebuked Lyles and stated that "he could not be connected in any way with narcotics (RT 145). Lyles told Petitioner of his plan, which was to pass off "flour or sugar or baking soda" as cocaine (RT 145). Lyles asked Petitioner just to play a part and that he would be given up to $200.00. Petitioner insisted that it could not involve any narcotics (RT 146). Petitioner so testified at the time of trial but was unable to corroborate this claim of entrapment without the testimony of Lyles.

During the first week of February 1974, DEA Agent Charles Mathis and Ric Lyles came to Petitioner's apartment on several occasions. At these times, as prearranged, rehearsed and directed by Lyles, Petitioner played the part of a seller of cocaine. The first occasion involved negotiations for a sale of a sample; the second occasion a sample was delivered (Count I of Indictment) at which time Lyles tested it by placing a small portion to his nose (RT 148). Two hours later, Mathis and Lyles came back and a larger quantity of white powder was delivered (Count II of Indictment). Several days later, Lyles and Mathis returned to Petitioner's apartment and Mathis told Petitioner that the package wasn't the same as the sample (RT 153). That was Petitioner's first knowledge that there was cocaine in the package. Prior to that time, Lyles had

assured Petitioner that the white powder was only baking soda or sugar (RT 154).

The quashing of the subpoena deprived Petitioner of a fair trial by preventing the Petitioner

(a) from corroborating that the transactions on February 6, 1974, were arranged and engineered by Ric Lyles, a government agent;

(b) from establishing that the government was the source of the cocaine sold to the DEA Agent Mathis;

(c) from proving that Petitioner, although a willing participant in a con game, had no knowledge that the white powder contained a controlled substance; and

(d) from proving that Petitioner's reluctance and unwillingness to participate in criminal activity was overcome by the persuasion of Lyles and he was, thus, entrapped.

VI.

REASONS FOR GRANTING THE WRIT

Conflict Between the Decision of the Ninth Circuit Filed April 5, 1976, and the Decision of the Fifth Circuit In *United States v. Godkins*, 527 F.2d 1321; Important Question of Constitutional Law

Both the *Long* case and the *Godkins* case involved prosecutions for distribution of cocaine under alleged violations of 21 USC §841. Both cases involved applications by the defendants for government assistance in serving subpoenas on witnesses who were known to the defendant and who were present at the time of the alleged sale, and who had introduced the defendant to the special agent who allegedly completed the purchase. In the case of the Petitioner, the Ninth Circuit approved the quashing of a

defendant's subpoena. In the *Godkins* case, the Fifth Circuit Court stated at page 1325:

> "° ° ° we hold that it was error for the district court to deny appellant his Sixth Amendment right to call Doe as a witness.
>
> ° ° °
>
> "The court's prohibition against calling John Doe as a witness at trial, ° ° ° presents a ° ° ° serious issue of constitutional dimension. The Sixth Amendment guarantees to a criminal defendant certain fundamental rights, including the right to call witnesses on his behalf at trial, and to have the use of compulsory process if necessary to achieve this purpose. In this case, however, the district court found that appellant's Sixth Amendment rights must be subordinated to the government's claim of confidential informer's privilege as enunciated by the Supreme Court in *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).
>
> "In *Roviaro* the Supreme Court recognized for the first time the existence of a confidential informer's privilege, which it defined as 'in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.' 353 U.S. at 59, 77 S. Ct. at 627. In that case, Roviaro had unsuccessfully sought prior to trial, to learn the identity of the government informer ° ° °. The Supreme Court held that the district court had erred in upholding the government's assertion of the privilege, given that the informer was the sole participant, other than Roviaro, in the transaction charged and the only witness in a position to amplify or contradict the testimony of government witnesses. ° ° °
>
> ° ° °
>
> "*Roviaro* thus appears to function as a limitation, in certain circumstances, on a criminal defendant's Sixth Amendment right to call a witness whose testimony could have a bearing on his defense. This results because it places limitations on the power of an accused to require the government to disclose the name of an informer. If the confidential informer's privilege is applicable, the defendant is prevented from obtaining access to the witness, for one cannot subpoena a witness whose name one does not know. This is quite a different matter from denying a defendant the right to subpoena a witness already known to him and who was present at the time of the alleged sale and who had introduced the defendant to the special agent who allegedly completed the purchase. We have found no case which authorizes a trial court to restrict the right of an accused person to subpoena any witness already known by him to give relevant testimony simply because by questioning such witness he may be uncovered as an informer.
>
> "The possibility that the witness's testimony might reveal the identity of a government informer connected with the case simply is not enough to bring this case within the scope of *Roviaro's* indirect limitations of a criminal defendant's Sixth Amendment right to call witnesses. See *United States v. Davenport*, 312 F.2d 303 (7th Cir. 1963), where at page 305 the court said:
>
> > " 'Undoubtedly defendant is correct in his insistence that he was entitled to the right to have compulsory attendance of witnesses and that who they were to be was a matter for him and his counsel to decide. . . . That the witness was an informer is irrelevant.'
>
> "Moreover, the concerns voiced by the Supreme Court in *Roviaro*—there the desirability of shielding from disclosure to those who would have cause to resent it, the identity of an informer—are not violated by our holding here. Appellant, the person who would have the greatest cause to resent the actions of the alleged informer, is not seeking disclosure of the informer's identity, but is merely exercising his Sixth Amendment right to call a witness whose identity and participation in the alleged illegal acts are already known to him. *Roviaro* does not apply in this situation and consequently we find the district court's refusal to allow appellant to call Doe as a witness at trial constituted reversible error."

Thus, the Fifth Circuit, in *Godkins*, and the Seventh Circuit in *United States v. Davenport*, 312 F.2d 303 (7th Cir., 1963), have taken the firm position that the Sixth Amendment means what it says. That is, that a defendant in a criminal trial is entitled to subpoena those witnesses that the defendant believes can give material testimony that is relevant to the issues presented in the case, and that once the identity of the informant is known that there is no privilege. The Court below begged the question by a curious line of reasoning which held that if the informant was involved in other unrelated transactions that the privilege remained, even if his identity had been disclosed to the defendant. The *per curiam* opinion of the Ninth Circuit thereby misapplied and distorted the holding of *Roviaro v. United States*, 353 U.S. 53 (1957), in the following manner:

> "In *Roviaro v. United States*, 353 U.S. 53, 60, (1957), the Supreme Court stated that 'once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.' ° ° ° [But] ° ° ° persons other than the particular defendant may have cause to resent the informant's conduct, and disclosure to the defendant alone may not be equivalent to disclosure to these other persons. The *in camera* interrogation of the informant indicated that this was the situation in the present case. The informant had been involved in eight or ten transactions involving a distinct clique of participants in the drug traffic in the Seattle area. Those in the clique he had exposed were aware of his role, but members of the much larger group were not. The informer feared that if he appeared at trial as a government witness his role as an informer would be established with the later group as well. On this record the trial court could conclude that the informer privilege continued to serve its intended purpose despite the transmittal of the informant's name to appellant's counsel. ° ° °

> "Since the informer's privilege remained, the *in camera* procedure adopted by the court to aid it in determining whether the government interest protected by the privilege outweighed appellant's right to prepare his defense ° ° °." *United States v. Long*, ... F.2d .... (1976).

Whether or not the informant's privilege remained as to any other potential defendants in any other unrelated cases is totally beside the point. The Ninth Circuit, in giving critical importance to this factor, committed error that must be corrected. As to the Petitioner, John Henry Long, the government waived the privilege and disclosed the identity of the informant. See Rule 510 and 511, Federal Rules of Evidence (Supreme Court Version), Appendix A, page A-1. After the disclosure of the name of the informant, his identity was no longer confidential as to the Petitioner. The trial court's taking of testimony of Ric Lyles *in camera* is a violation of Rule 26 of the Federal Rules of Criminal Procedure that require the taking of testimony of witnesses in open court.

The right to present a defense in a criminal case is a right that belongs to the defendant himself. In the absence of an applicable privilege (which was not applicable here because the informer's identity had been disclosed) the prosecution or the court does not have the right to censor the proposed witnesses of the defense or their expected testimony by conducting a prior restraint or review of the defendant's case. Such would be trial by the court rather than trial by an impartial jury. The right to compulsory process is a fundamental right of due process guaranteed by the Sixth Amendment. In *Washington v. State of Texas*, 388 U.S. 14, at 19, 87 S. Ct. 1920 at 1923, the court said:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

The failure to give Petitioner compulsory process for attendance of witness constituted error of constitutional proportions. *United States v. Godkins, supra,* 527 F.2d 1321 (1976).

The disclosure of the name of the informant waives the privilege. In *Roviaro,* 353 U.S. 53, 59, Justice Burton, speaking for the Court, said:

> "What is usually referred to as the informer's privilege is in reality the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."

The Court further stated:

> "° ° ° Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. ° ° ° He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package ° ° °. The desirability of calling John Doe as a witness, ° ° ° was a matter for the accused rather than the Government to decide.
>
> ° ° °
>
> "This is a case where the Government's informer

> was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. ° ° °" 353 U.S. at 64.

Once the name of Ric Lyles was known to the Petitioner his identity was no longer confidential. The purpose of the privilege is to encourage the communication of knowledge of the commission of crimes to law enforcement officials and by preserving anonymity foster the flow of information. The secrecy and confidentiality under the informer's privilege relates to the identity of the informer. It is evident that the privilege should terminate when the holder, by his own act, destroys this confidentiality. See *McCormick,* §§ 87, 97, 100; 8 *Wigmore,* §§ 2242, 2327-2329, 2374, 2389-2390.

Ric Lyles was used as an undercover informant in more than one case for the government. Each case in which he may have acted as an informant-participant is a separate case. In the language of *Roviaro* "those who would have cause to resent his conduct" would necessarily be different individuals in each of the separate cases in which the informant acted. In the same manner, the identification of those who would have cause to resent his conduct must be made on a case by case basis. In the court below, the government voluntarily disclosed the informant's name and volunteered to assist in the service of the subpoena (CR-5-6). By such action, the government relinquished its opportunity to employ the "in camera" procedure provided in Rules of Evidence 510(c) (U. S. Supreme Court Version), which had received the approval of the courts of the Ninth Circuit in *United States v. Alvarez,* 472 F.2d 111 (9th Cir., 1973), and *United States v. Rawlinson,* 487

F.2d 5 (9th Cir., 1973). That action constituted a waiver of the identity of informer privilege, and was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); Rules of Evidence, Rule 511 (U.S. Supreme Court Version). In the Advisory Committee's notes to Rule 511, it is stated:

> "However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code, §912; 8 Wigmore §2327 (MacNaughton Rev. 1961)."

The opinion filed by the Ninth Circuit on April 5, 1976, erroneously decided an important question of Federal constitutional law when it concluded that "the informer's privilege remains."

The Ninth Circuit has held that the government is required to produce an informant as a potential witness when there are special circumstances such as the typical defense of entrapment with a defendant (such as the Petitioner) who had no prior narcotics record and engaged in but a single sale of narcotics, and where the informant is the sole witness who could testify to the alleged entrapment. *United States v. Fong*, 491 F.2d 1390 (9th Cir.; 1974). At the trial court in a legal brief filed in support of the government's motion regarding the informant, the government conceded that the privilege of *Roviaro* was not applicable. It there stated:

> "The government concedes that it is required to disclose the identity of the informant under *Roviaro v. United States*, 353 U.S. 53 (1957), and has done so." (R 17)

The court below's reliance on *Roviaro* under such circumstances is clearly error because of the waiver.

VII.
CONCLUSION

The Sixth Amendment right of compulsory process is one of the fundamentals of criminal trial procedure. The unprecedented action of the District Court in depriving the Petitioner of that constitutional right, as approved by the Ninth Circuit, presents an issue that must be reviewed by the Supreme Court of the United States. The test of Rule 19 of the Rules of this Court are present. That is, the decision of the Ninth Circuit below is (1) in conflict with the decision of the Fifth Circuit in *United States v. Godkins*, 527 F.2d 1321; (2) decides an important question of constitutional law which has not been, but should be decided by the Supreme Court; and (3) emasculates the decision of the Supreme Court in *Roviaro v. United States*, 353 U.S. 53, so that even after the defendant has learned of the identity of a defense witness, he is deprived of his constitutional rights of compulsory process unless and until after a Star Chamber *in camera* procedure, the trial judge ratifies the defendant's choice of witnesses. The quashing of the defense subpoena was not in accordance "with the principles of the common law" (Rule 501, Federal Rules of Evidence, Appendix A).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. MCATEER,
Attorney for Petitioner

APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT TO THE CONSTITUTION

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CODE ANNOTATED

FEDERAL RULES OF EVIDENCE

RULE 501. *General Rule.*

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat.1933.

RULES OF EVIDENCE

UNITED STATES SUPREME COURT VERSION

RULE 510. *Identity of Informer*

(a) *Rule of Privilege.*—The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) *Who may Claim.*—The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.

(c) *Exceptions.*

(1) *Voluntary Disclosure; Informer a Witness.*—No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) *Testimony on Merits.*—If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affi-

davit. If the judge finds there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera,* at which no counsel or party shall be permitted to be present.

(3) *Legality of Obtaining Evidence.*—If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made *in camera.* All counsel and parties concerned with the issue of legality shall be permitted to be present at every state of proceedings under this subdivision except a disclosure *in camera,* at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made *in camera,* the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

RULE 511. *Waiver of Privilege by Voluntary Disclosure*

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN HENRY LONG, *Defendant-Appellant.*	No. 74-2536 OPINION

[April 5, 1976]

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING and TRASK, Circuit Judges, and
JAMESON,* District Judge.

PER CURIAM:

This is an appeal from a conviction under an indictment charging Defendant-Appellant John Henry Long with two sales of cocaine in violation of 21 U.S.C. § 841(a)(1). We affirm.

1. Appellant's principal contention is that the trial court erred in quashing a subpoena served upon the government's informant.

The government provided appellant with the name of the informant but not his whereabouts. Appellant subpoenaed the informant pursuant to Federal Rules of Criminal Procedure 17(b). The informant was served while in the United States Attorney's office to be interviewed by appellant's counsel. The government sought to quash the subpoena asserting that the informant was (1) ill, (2) in fear for his life, (3) involved in other investigations that might be revealed if he testified at trial, and, in any event, (4) not possessed of information that would

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

assist appellant. The government asked the court to interview the informant *in camera* pursuant to *United States v. Rawlinson*, 487 F.2d 5 (9th Cir. 1973), to determine if his testimony would be relevant to the defense. The court asked appellant's counsel why he needed the informant's testimony. Appellant's counsel told the court, *in camera*, that the informant had induced appellant to enter into a scheme to defraud the buyer (a government agent) by selling him a white powder, furnished by the informant, represented to the buyer to be cocaine but which the informant told appellant was in fact baking soda or sugar. The court decided to conduct an *in camera* interview of the informant. The court offered to allow both counsel to participate. To avoid revealing the defense, appellant's counsel agreed instead to interview the informant and submit questions which the court would ask the informant in the absence of both counsel. This was done. After the *in camera* interrogation, the court stated it was convinced that the informant's testimony would not be harmful to the government or helpful to the defense and would be cumulative of other evidence. The court concluded that there was no satisfactory showing that it was necessary to have the informant testify or that appellant would be prejudiced if he did not. Balancing these considerations against the government's interest in protecting the informant, the court concluded that the subpoena should be quashed.

Appellant points out that in both *United States v. Rawlinson, supra*, and *United States v. Alvarez*, 472 F.2d 111 (9th Cir. 1973), the question was whether the government should be required to disclose the identity of a confidential informant, and argues that in this case the government revealed the informer's identity and thus waived the privilege. Absent the privilege, appellant argues, the right to compulsory process guaranteed by the Fifth Amendment gives appellant the right to select the witnesses he will present (including government informers, *see United States v. Godkins*, ___ F.2d ___, ___ (5th Cir. 1976); *United States v. Davenport*, 312 F.2d 303, 305 (7th Cir. 1963)), and the court may not conduct a pre-trial review of the testimony of those witnesses and bar those the court thinks will not be helpful to the defense.

In *Roviaro v. United States*, 353 U.S. 53, 60 (1957), the Supreme Court stated that "once the identity of the informer

assist appellant. The government asked the court to interview the informant *in camera* pursuant to *United States v. Rawlinson*, 487 F.2d 5 (9th Cir. 1973), to determine if his testimony would be relevant to the defense. The court asked appellant's counsel why he needed the informant's testimony. Appellant's counsel told the court, *in camera*, that the informant had induced appellant to enter into a scheme to defraud the buyer (a government agent) by selling him a white powder, furnished by the informant, represented to the buyer to be cocaine but which the informant told appellant was in fact baking soda or sugar. The court decided to conduct an *in camera* interview of the informant. The court offered to allow both counsel to participate. To avoid revealing the defense, appellant's counsel agreed instead to interview the informant and submit questions which the court would ask the informant in the absence of both counsel. This was done. After the *in camera* interrogation, the court stated it was convinced that the informant's testimony would not be harmful to the government or helpful to the defense and would be cumulative of other evidence. The court concluded that there was no satisfactory showing that it was necessary to have the informant testify or that appellant would be prejudiced if he did not. Balancing these considerations against the government's interest in protecting the informant, the court concluded that the subpoena should be quashed.

Appellant points out that in both *United States v. Rawlinson, supra*, and *United States v. Alvarez*, 472 F.2d 111 (9th Cir. 1973), the question was whether the government should be required to disclose the identity of a confidential informant, and argues that in this case the government revealed the informer's identity and thus waived the privilege. Absent the privilege, appellant argues, the right to compulsory process guaranteed by the Fifth Amendment gives appellant the right to select the witnesses he will present (including government informers, *see United States v. Godkins*, ... F.2d ....., ... (5th Cir. 1976); *United States v. Davenport*, 312 F.2d 303, 305 (7th Cir. 1963)), and the court may not conduct a pre-trial review of the testimony of those witnesses and bar those the court thinks will not be helpful to the defense.

In *Roviaro v. United States*, 353 U.S. 53, 60 (1957), the Supreme Court stated that "once the identity of the informer

has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." The Court of Appeals for the Fifth Circuit recently held that this means that a defendant may not be barred from subpoenaing "any witness already known by him." *United States v. Godkins, supra.* No doubt this is the general rule. Ordinarily, the defendant will be the only person "who would have cause to resent the communication"; and if the defendant knows the identity of the informant, the purpose of the privilege "to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct" (*Roviaro v. United States, supra,* 353 U.S. at 60 n.8), can no longer be accomplished. But this is not always true. Persons other than the particular defendant may have cause to resent the informant's conduct, and disclosure to the defendant alone may not be equivalent to disclosure to these other persons. The *in camera* interrogation of the informant indicated that this was the situation in the present case. The informant had been involved in eight or ten transactions involving a distinct clique of participants in the drug traffic in the Seattle area. Those in the clique he had exposed were aware of his role, but members of the much larger group were not. The informer feared that if he appeared at trial as a government witness his role as an informer would be established with the latter group as well. On this record the trial court could conclude that the informer privilege continued to serve its intended purpose despite the transmittal of the informant's name to appellant's counsel. *Cf. United States v. Godkins, supra,* ___ F.2d ___, ___ n.1 (Judge Gee, specially concurring).

Since the informer's privilege remained, the *in camera* procedure adopted by the court to aid it in determining whether the government interest protected by the privilege outweighed appellant's right to prepare his defense (*United States v. Roviaro, supra,* 353 U.S. at 62) was proper under *United States v. Rawlinson, supra; United States v. Alvarez, supra;* and *United States v. McLaughlin,* ___ F.2d ___, ___ (9th Cir. 1975). *See also United States v. Freund,* 525 F.2d 873, 876-78 (5th Cir. 1976) (authorities cited). On the basis of the whole record, including the transcript of the *in camera* proceedings, we are unable to say the trial court erred in striking the *Roviaro*

balance. It is true that the informant participated in the transaction, and his testimony would have been critical if it had corroborated that of appellant. On the other hand, the informant was not the only witness to the actual sales, and the testimony of the government agent to whom both sales were made was essentially the same as the informer's *in camera* testimony. To the extent that it was not cumulative, the informer's testimony was adverse to appellant in every respect. The informer had been productive in a large number of investigations. His exposure would not only end that cooperation, but, in all probability, would discourage communications from others as well. The risk from further disclosure was real; there were reports from independent sources that two "contracts" for the informant's execution were already in existence.

Even if the informer's privilege had ended with the disclosure of the informant's name to appellant's counsel, we would reject appellant's challenge to his conviction on the ground that if appellant was erroneously prevented from using the informant as a witness, the error was harmless beyond a reasonable doubt. Error resulting in the unavailability of a witness is subject to the harmless error rule (*United States v. Perlman*, 430 F.2d 22, 26 (7th Cir. 1970); *United States v. Watson*, 421 F.2d 1357, 1358 (9th Cir. 1970); *Greenwell v. United States*, 317 F.2d 108, 111 (D.C. Cir. 1963)); and, as we have said, the *in camera* transcript demonstrates that the testimony of the informer would have been consistent with that of the government agents, largely cumulative, and adverse to appellant to the extent it was not cumulative.

2. Appellant complains because the court declined to instruct the jury that failure to produce a material witness peculiarly within the control of a party creates a presumption that the absent witness's testimony would be adverse to that party. Appellant also complains because the court intervened when defense counsel told the jury in closing argument that a subpoena had been issued for the informant and served "but the government saw fit not to produce him." The court told the jury that the informant's absence "results from an order of the court and neither the defendant nor the government is responsible for his failure to testify. The court's order prohibiting the appearance

of this witness was based upon facts that are not relevant or material to your deliberations."

The court did not err. A "missing witness" instruction is proper only if "from all the circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one." *Burgess v. United States*, 440 F.2d 226, 234 (D.C. Cir. 1970). Here, the witness was absent in part because the court had concluded that his testimony would *not* be favorable to the defense. Appellant also argues, citing Judge Fahy's discussion in *Burgess*, 440 F.2d at 234-35, that even though a "missing witness" instruction may not be appropriate, counsel should be permitted to comment on the absence of the witness. But the court did not forbid all reference to the absence of the informer. The court simply gave the jury the information it needed to evaluate any comment that might be made, and to avoid being misled. The court's comment was fair and accurate; contrary to appellant's assertion, it neither suggested that the informant's testimony would have supported the Government, nor "downgraded defense counsel before the jury."

3. Relying upon *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), and *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974), appellant argues that appellant's testimony that the substance sold to the agent was provided by the informer established entrapment as a matter of law, and required the government to produce the informer as a witness to contradict appellant's testimony. We need not decide whether the *Bueno* rule survived *United States v. Russell*, 411 U.S. 423 (1973) (*compare United States v. Mosley*, 496 F.2d 1013 (5th Cir. 1974), and *United States v. West*, 511 F.2d 1083 (3d Cir. 1975), *with United States v. Jett*, 491 F.2d 1078 (1st Cir. 1974), and *United States v. Hampton*, 507 F.2d 832 (8th Cir. 1974), *cert. granted*, 420 U.S. 1003 (1975)), a question the Supreme Court may decide shortly in *Hampton*. *Bueno* does not require that the informant be produced but only that the government go forward with sufficient evidence to controvert the defendant's testimony as to the source of the contraband. *United States v. Dovalina*, 525 F.2d 952, 955-56 (5th Cir. 1976); *United States v. Soto*, 504 F.2d 557 (5th Cir. 1974); *United States v. Gomez-Rojas*, 507 F.2d 1213, 1218 (5th Cir. 1975); *see also United States v. Gurule*, 522 F.2d

20, 24 (10th Cir. 1975) (holding that the jury may disbelieve uncontradicted testimony by the defendant as to the source of the contraband). In this case the government offered evidence which, if true, would have made it impossible for appellant to have obtained the substance from the informer as he testified. In view of this conflict in evidence, a question of fact as to the source of the cocaine was presented for the jury to resolve. *United States v. Dovalina, supra.* Appellant failed to request an instruction submitting this question of fact and the *Bueno* defense to the jury.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-8-76—400

No. 75-1776

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HENRY LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
KENNETH A. HOLLAND,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1776

JOHN HENRY LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 533 F. 2d 505.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1976. A petition for rehearing was denied on May 17, 1976. The petition for a writ of certiorari was filed on June 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court violated petitioner's Sixth Amendment right to compulsory process by quashing a defense subpoena for the testimony of a known government informant, where further disclosure of the informant's identity through trial testimony

would have prejudiced other aspects of an ongoing investigation and endangered the informant's life and where the informant's testimony would have been either cumulative or adverse to petitioner.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of two counts of distributing cocaine in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of two years' imprisonment to be followed by three years' special parole. The court of appeals affirmed (Pet. App. B).

On February 4, 1974, federal narcotics agent Charles Mathis, accompanied by Rick Lyles, a government informant, met with petitioner at the latter's residence for the purpose of purchasing narcotics (Tr. 75-76). Mathis negotiated with petitioner to purchase "unlimited amounts of cocaine and heroin" (*id.* at 76). Two days later, Mathis and Lyles returned to petitioner's residence and Mathis purchased a sample of cocaine (Tr. 78-79). That night, Mathis purchased two more ounces of cocaine from petitioner (Tr. 81).

Petitioner testified that he sold to Mathis what he believed to be baking soda or sugar at the direction of Lyles, who provided petitioner with the substances. He denied knowing that the substances he sold were cocaine (Tr. 145-152).

Prior to trial, the defense moved for disclosure of the identity of the government informant. The government provided the defense with the name of Rick Lyles. Defense counsel served Lyles with a subpoena, pursuant to Rule 17(b), Fed. R. Crim. P., while Lyles was at the United States Attorney's office. The government moved to quash the subpoena on the grounds that

the informant feared for his life, that he was then involved in other investigations that might be compromised if he testified, and that he did not have information that would be beneficial to petitioner (Pet. App. A4-A5).

Petitioner's counsel informed the district court, during *in camera* proceedings, that petitioner would testify that the informant had induced him to enter into a scheme to defraud a buyer (who turned out to be the government agent) by selling him a white powder furnished by the informant, which petitioner believed, on the informant's representations, to be baking soda and sugar (Tr. 15).

After the defense was given an opportunity to interview the informant, and based in part on questions submitted by petitioner's counsel, the district court conducted an *in camera* interrogation of the informant outside the presence of government and defense counsel. Following this interrogation, the court concluded that the informant's "testimony would be cumulative [and] not harmful to the government" (Tr. 68). The court accordingly quashed the subpoena.

ARGUMENT

Petitioner contends that he was entitled to the informant's testimony and that the "informer's privilege" was waived by the government when it disclosed the informant's identity. The contention was thoroughly considered and correctly rejected by the court of appeals, on whose opinion we principally rely.

In *Roviaro* v. *United States*, 353 U.S. 53, 59, this Court recognized "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Since "the purpose of

the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct" (*id.* at 60, n. 8), the privilege is inapplicable "once the identity of the informer has been disclosed to those who would have cause to resent the communication" (*id.* at 60). The privilege may also give way if, in a particular case, "fundamental requirements of fairness" dictate disclosure (*ibid.*). The Court stated (*id.* at 62):

> The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Petitioner's argument is simply that the *Roviaro* privilege was waived when the government disclosed to him the informant's identity. As the court of appeals stated, however, this case presents the unusual situation in which "[p]ersons other than the particular defendant may have cause to resent the informant's conduct, and disclosure to the defendant alone may not be equivalent to disclosure to these other persons" (Pet. App. A6). The court explained the situation as follows (*ibid.*):

> The informant had been involved in eight or ten transactions involving a distinct clique of participants in the drug traffic in the Seattle area. Those in the clique he had exposed were aware of his role, but members of the much larger group were not. The informer feared that if he appeared at trial as a government witness his role as an informer would be established with the latter group as well. On this record the trial court could conclude that the informer privilege continued to serve its intended purpose despite the transmittal of the informant's name to [petitioner's] counsel.

The privilege was invoked here by the government (and sustained by the courts below) not to prevent disclosing the informant's identity to petitioner. The government freely made that disclosure. The privilege was invoked to avoid disclosure to other participants in ongoing Seattle drug transactions with respect to which the informant was continuing to furnish critical information. In the special circumstances of this case, the considerations that give rise to the "informer's privilege" (*Roviaro* v. *United States, supra,* 353 U.S. at 59) were fully applicable notwithstanding the limited disclosure already made to petitioner.[1]

The remaining question under *Roviaro* is whether "fundamental requirements of fairness" (353 U.S. at 60) nevertheless outweighed the privilege so that petitioner should have been allowed to call the informant as a witness nowithstanding the consequences of additional disclosure. That essentially factual inquiry was made by both courts below, and both correctly concluded that the balance dictated against further disclosure. As the court of appeals stated (Pet. App. A6-A7):

> On the basis of the whole record, including the transcript of the *in camera* proceedings, we are unable to say the trial court erred in striking the

[1] *United States* v. *Godkins,* 527 F. 2d 1321 (C.A. 5), on which petitioner relies, is not to the contrary. There was no showing in that case, as there was here, that the informant's appearance at trial as a witness would jeopardize an ongoing criminal investigation and expose the informant to a significant additional risk of harm.

Roviaro balance. It is true that the informant participated in the transaction, and his testimony would have been critical if it had corroborated that of [petitioner]. On the other hand, the informant was not the only witness to the actual sales, and the testimony of the government agent to whom both sales were made was essentially the same as the informer's *in camera* testimony. To the extent that it was not cumulative, the informer's testimony was adverse to [petitioner] in every respect. The informer had been productive in a large number of investigations. His exposure would not only end that cooperation, but, in all probability, would discourage communications from others as well. The risk from further disclosure was real; there were reports from independent sources that two "contracts" for the informant's execution were already in existence.

Finally, the court of appeals correctly held—and petitioner does not expressly challenge the holding—that on the present record any error in quashing petitioner's subpoena was harmless beyond a reasonable doubt (Pet. App. A7):

> Even if the informer's privilege had ended with the disclosure of the informant's name to [petitioner's] counsel, we would reject [petitioner's] challenge to his conviction on the ground that if [petitioner] was erroneously prevented from using the informant as a witness, the error was harmless beyond a reasonable doubt. Error resulting in the unavailability of a witness is subject to the harmless error rule (*United States* v. *Perlman*, 430 F. 2d 22, 26 (7th Cir. 1970); *United States* v. *Watson*, 421 F. 2d 1357, 1358 (9th Cir. 1970); *Greenwell* v. *United States*, 317 F. 2d 108, 111 (D.C. Cir. 1963)); and, as we have said, the *in camera* transcript demonstrates that the testimony of the informer would

> have been consistent with that of the government agents, largely cumulative, and adverse to [petitioner] to the extent it was not cumulative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
KENNETH A. HOLLAND,
Attorneys.

AUGUST 1976.